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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 438

FULTON IRON COMPANY, A CORPORATION,
Petitioner,

vs.

JESS LARSON, AS WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JAMES R. KIRKLAND,
JAMES EASLY,
WALTER H. MALONEY,
EDWARD J. HAYES,
IRVIN GOLDSTEIN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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vs.

JESS LARSON, AS WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR,
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The Petitioner, Fulton Iron Company, a corporation, Plaintiff, and appellant below, prays that a writ of certiorari be issued by this Court to review the judgment of the United States Court of Appeals, District of Columbia Circuit, entered October 13, 1948 (R. 71) affirming a judgment of the United States District Court for the District of Columbia.

Opinion of the Court Below

The opinion of the Court of Appeals is not yet reported but is set out in full in the appendix hereto (R. 71).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347a, and Section 28 of the District of Columbia Uniform Sales Act of 1937, 50 Stat. 35, Chapter 43, Section 21; Title 28, Section 1205, District of Columbia Code, 1940 Edition.

Statutes Involved

Excerpts from the Surplus Property Act of 1944; Public Law 457, 58 Stat. 763, 78th Congress; Ch. 479-2d Session:

> *Sec. 2.* The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—
>
> (a) to assure the most effective use of such property for war purposes and the common defense;
>
> (b) to give maximum aid in the reestablishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment;
>
> (c) to facilitate the transition of enterprises from wartime to peacetime production and of individuals from wartime to peacetime employment;
>
> (d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise;
>
> • • • • • • •
>
> (t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.

Sec. 20. Applicability of Antitrust Laws.

Whenever any disposal agency shall begin negotiations for the disposition to private interests of a plant or plants or other property, which cost the Government $1,000,000 or more, or of patents, processes, techniques or inventions, irrespective of cost, the disposal agency shall promptly notify the Attorney General of the proposed disposition and the probable terms or conditions thereof. Within a reasonable time, in no event to exceed ninety days after receiving such notification, the Attorney General shall advise the Board and the disposal agency whether, in his opinion, the proposed disposition will violate the antitrust laws. Upon the request of the Attorney General, the Board or other Government agency shall furnish, or cause to be furnished such information as it may possess which the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section or to determine whether any other disposition of surplus property violates the antitrust laws. Nothing in this Act shall impair, amend, or modify the antitrust laws or limit and prevent their application to persons who buy or otherwise acquire property under the provisions of this Act. As used in this section, the term "antitrust laws" includes the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act; and the Act of August 27, 1894 (ch. 349, secs. 73, 74, 28 Stat. 570), as amended.

Excerpt from the District of Columbia Uniform Sales Act of 1937, 50 Stat. 35, ch. 43, sec. 21:

Sec. 28-1205 (11:81). • • •

In the case of a sale by auction—

(1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer.

or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

Excerpt from the United States Code, Section 308; Revised Statutes Section 308:

> Reference of questions to subordinates. Any question of law submitted to the Attorney General for his opinion, except questions involving a construction of the Constitution of the United States, may be by him referred to such of his subordinates as he may deem appropriate, and he may require the written opinion thereon of the officer to whom the same may be referred. If the opinion given by such officer is approved by the Attorney General, such approval indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney General.

Summary Statement of the Matter Involved

On September 13, 1947, the Administrator of War Assets, the predecessor in office of respondent, by letter (Exhibit F, R. 27), offered to sell certain surplus property designated by War Assets Administration as "Plancor 438."

Plancor 438 is a blast furnace plant located in Granite City, Illinois. On January 26, 1942, Koppers Company, Inc., sold this plant to the Government and has been operating the same ever since as a lessee of the Government. Twice before attempts to sell said Plancor had been made. On the first attempt no bids were received and on the second attempt two bids were received of which the Petitioner's was the higher but the bids were rejected by the War Assets Administration as being inadequate. The lower bid was filed by Hanna Coal and Ore Company in the name of a local company.

On September 6, 1947, said Administrator determined and set the fair value of said Plancor at $2,500,000 (Exhibit

G, R. 32) pursuant to War Assets Administration Regulation 5, Part 8305.13(a) which reads as follows:

> Except as provided otherwise in this section, the disposal agency shall in all cases establish the fair value of the property assigned to it for disposition.

The fair value so set by said Administrator continued in effect and was the fair value of said Plancor on October 6, 1947, the day upon which said Administrator had announced (Exhibit F, R. 23) that he would receive bids for the sale of said Plancor.

Prior to October 6, 1947, said Administrator informed petitioner that the fair value of said Plancor had been set at $2,500,000. Petitioner thereupon prepared and filed a bid in excess of said fair value.

On October 6, 1947, the following bids were filed with said Administrator:

Missouri-Illinois Furnaces, Inc.	$3,255,000
Tucker Corporation	2,751,000
Fulton Iron Company	2,750,000

Missouri-Illinois Furnaces, Inc., is a corporation which was organized on October 3, 1947, by Koppers Company, Inc., and Hanna Coal and Ore Company for the purpose of bidding on said Plancor. The two companies owned equally the shares of the stock of Missouri-Illinois Furnaces, Inc., of which the directors, with one exception, were either officers and/or directors of Koppers Company, Inc., or Hanna Coal and Ore Company.

On October 10, 1947, four days after the bids had been opened, said Administrator increased the minimum fair value of said Plancor to $3,250,000 (Exhibit H, R. 34) without cause shown and without any notice to petitioner.

As a result of the action of said Administrator in arbitrarily increasing said fair value, petitioner's bid, which

was $250,000 greater than the fair value in effect on October 6, 1947, became $500,000 less than the fair value as increased by said Administrator on October 10, 1947. The bid of Missouri-Illinois Furnaces, Inc., then became the only bid in excess of the new fair value, and by a remarkable coincidence, only $5,000 greater than the new fair value.

The consequence of this action of said Administrator was to disqualify the bid of petitioner by reason of War Assets Regulation 5, Part 8305.19(a) which provides as follows:

> • • • disposal agencies may reject any offer which is below the fair value of the property • • •

The bid of petitioner fully complied with all the terms and conditions of said Administrator's offer to sell (Exhibit F, R. 27) and said War Assets Regulation 5 and was, on the date when filed with and opened by said Administrator, in an amount greater than the fair value as then set by said Administrator. The said Administrator's Letter and Formula for Acceptable Proposals (Exhibit F, R. 27) by its very terms was an offer to sell said Plancor:

> War Assets Administrator will make sale of this property to the bidder whose purchase proposal (a) meets and/or betters the terms and conditions of this Formula for Acceptable Proposals on a competitive basis and (b) best meets the Objectives of the Surplus Property Act. (Exhibit F, second paragraph, R. 27)

Petitioner, by filing its bid with said Administrator, accepted said offer and thereby entered into a binding contract with said Administrator for the purchase of said Plancor provided that no one else filed a more acceptable bid which did not fail.

Although the bid of Missouri-Illinois Furnaces, Inc., was for a larger amount than the bid of petitioner and was a more acceptable bid in that respect only, nevertheless, the

bid of Missouri-Illinois Furnaces, Inc., failed so that the bid of petitioner was the most acceptable bid.

The Administrator, having in mind that bids for the purchase of surplus property might fail, established the procedure for such cases in Regulation 5, Part 8305.19(d) as follows:

> Notice to Unsuccessful Bidders: Non-performance by Successful Bidder.
>
> When an offer for surplus real property has been accepted, the disposal agency shall notify the unsuccessful bidders of such acceptance and return their deposits, if any, to them. If the successful bidder fails to complete the transaction, the disposal agency shall promptly notify by mail all those who made unsuccessful offers during the priority period or any time allowed thereafter that if they renew their offers within fifteen (15) days from the date of mailing of the notice they will be reconsidered on the same basis on which they would have been considered had the offer accepted not been received in the first instance.

Upon the failure of the bid of Missouri-Illinois Furnaces, Inc., on the several grounds hereinafter set forth, petitioner became entitled to the benefit of said Regulation 5, Part 8305.19(d) and respondent was under a duty to perform his contract with petitioner by observing and carrying out the provisions of said Regulation.

On December 31, 1947, said bid of Missouri-Illinois Furnaces, Inc., failed in that it expired by reason of a condition in said bid that if transfer of title to Missouri-Illinois Furnaces, Inc., were not completed prior to December 31, 1947, then said bid shall become null and void (Exhibit A, Item 11, R. 16). Transfer of title to Missouri-Illinois Furnaces, Inc., was not made or completed prior to December 31, 1947, and had not been made on February 2, 1948, when

this action was filed in the District Court of the United States for the District of Columbia.

On January 12, 1948 (Exhibit B, R. 20) and within fifteen days following the expiration of said bid of Missouri-Illinois Furnaces, Inc., petitioner requested respondent to make said Plancor available to petitioner and offered to pay an additional amount of $505,000 so that the Government would receive as much from petitioner as it would have received from Missouri-Illinois Furnaces, Inc.

The bid of petitioner was the only bid which complied with the terms and conditions of said invitation for bids and said Regulation 5. The Tucker Corporation did not renew its bid.

However, respondent refused to consider the bid of petitioner.

The Surplus Property Act of 1944, Section 20, provides that whenever any disposal agency begins negotiations for the disposition to private interests of property which cost the government $1,000,000 or more, the disposal agency shall notify the Attorney General of the proposed disposition. Not more than ninety days after such notification, the Attorney General shall advise the disposal agency whether, in his opinion, the proposed disposition will violate the antitrust laws.

On October 17, 1947, said Administrator referred the bid of Missouri-Illinois Furnaces, Inc., to the Attorney General for his opinion whether the proposed disposal of said Plancor to Missouri-Illinois Furnaces, Inc., would violate the antitrust laws.

The Department of Justice determined that the disposal of said Plancor to Missouri-Illinois Furnaces, Inc., would violate the antitrust laws:

> This Department reached the conclusion that the combination of the two companies growing out of the

joint stock ownership of the proposed purchaser would, particularly because of the affiliations of Hanna Coal and Ore Company, result in violation of the antitrust laws (Exhibit I, third paragraph, R. 36).

Thereupon, Missouri-Illinois Furnaces, Inc., represented in a letter (Exhibit C, R. 23) dated January 14, 1948, to respondent that Hanna Coal and Ore Company on January 31, 1948, would sell its stock in Missouri-Illinois Furnaces, Inc., to Koppers Company, Inc., and that Missouri-Illinois Furnaces, Inc., would be dissolved and its property transferred to Koppers Company, Inc. This letter stated in part:

> • • • A copy of this letter is being sent to the Attorney General of the United States since the changes herein outlined are made to conform to his views (Exhibit C, last paragraph, R. 24).

On the same day, January 14, 1948, respondent replied by letter (Exhibit D, R. 21) to Missouri-Illinois Furnaces, Inc., stating that he had no objection to Hanna Coal and Ore Company selling its stock in Missouri-Illinois Furnaces, Inc., to Koppers Company, Inc., and that he had no objection to the dissolution of Missouri-Illinois Furnaces, Inc., and the transfer of its property to Koppers Company, Inc.

The next day, January 15, 1948, which was the last day of the ninety day period for the Attorney General to advise respondent of his opinion, an Acting Assistant Attorney General sent a letter (Exhibit E, R. 26) to respondent stating that a sale of said Plancor to Missouri-Illinois Furnaces, Inc., as a wholly owned subsidiary of Koppers Company, Inc., would not be in violation of the antitrust laws.

However, the Attorney General did not render an opinion pursuant to the requirements of the provisions of Section

20 of the Surplus Property Act of 1944, nor did he endorse his approval on the opinion of the Acting Assistant Attorney General as required by Title 5, U. S. C. A., Section 308, which provides that the Attorney General may refer to a subordinate a question of law submitted to the Attorney General and that if the Attorney General endorses his approval on the written opinion of the subordinate, it shall have the same force and effect of the Attorney General.

Consequently, respondent failed to obtain the opinion of the Attorney General specifically required by the Surplus Property Act as a prerequisite to the acceptance of the bid of Missouri-Illinois Furnaces, Inc., or the transfer of title.

Thereafter, respondent informed petitioner that he was proceeding to transfer title to Missouri-Illinois Furnaces, Inc., as a wholly owned subsidiary of Koppers Company, Inc., which was a new entity, a stranger to the proceedings and which had not filed a bid on October 6, 1947, the bid of Missouri-Illinois Furnaces, Inc., jointly owned by Hanna Coal and Ore Company and Koppers Company, Inc., having expired on December 31, 1947, and having been found by the Attorney General to be in violation of the anti-trust laws.

Accordingly, on February 2, 1948, petitioner sought an injunction in the District Court against respondent in his personal capacity to restrain him from doing unlawful acts and acts not authorized by the Surplus Property Act of 1944 and War Assets Regulation 5 promulgated to carry out that Act. The District Court denied successively petitioner's motion for a temporary restraining order, a temporary injunction and a motion for an injunction pending appeal but granted respondent's motion to dismiss. The Court of Appeals granted petitioner's mo-

tion for an injunction pending appeal and then affirmed the decision of the District Court.

Thereafter, petitioner filed its motion in the Circuit Court to stay the mandate and to continue the temporary injunction pending application for a writ of certiorari, which respondent opposed with the request that bond be required of petitioner. The Court overruled respondent's objection and stayed its mandate and continued the temporary injunction theretofore entered in full force and effect without bond (R. 83).

Respondent then filed a motion (R. 84) for a withdrawal or modification of certain portions of the Court's opinion of October 13, 1948 (R. 71) which petition the Court denied on November 10, 1948 (R. 94).

The Questions Presented

The questions involved are:

1. Does petitioner have the capacity to sue the Administrator of War Assets?

2. Did petitioner enter into a contract with the Administrator?

3. Is the United States an indispensable party to this suit?

Reasons Relied Upon for the Allowance of the Writ

1. Section 21 of the District of Columbia Uniform Sales Act of 1947 (50 Stat. 35, Ch. 43, Sec. 21) involving the distinction between an auction and an auction without reserve has not been determined by the Court.

2. The question whether or not the Administrator may act contrary to an Act of Congress and his own Regulations promulgated thereunder in disposing of surplus property is a matter of national concern.

3. The question whether or not the Administrator can breach his contract to sell surplus property to petitioner by selling the same property to another is a matter of great public interest and importance.

4. The determination of the questions raised in this case will clarify the proper disposal of the tremendous amount of Government surplus property and is of great interest and importance to both the Government and the public.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals, District of Columbia Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all proceedings in the case entitled *Fulton Iron Company* vs. *Jess Larson*, docketed in that Court as No. 9799, and your petitioner prays that the judgment of said Court of Appeals be reversed and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

FULTON IRON COMPANY,
By JAMES R. KIRKLAND,
JAMES EASLY,
WALTER H. MALONEY,
Per J. R. K.,
EDWARD J. HAYES,
Per I. G.,
IRVIN GOLDSTEIN,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 438

FULTON IRON COMPANY, A CORPORATION,
Petitioner,

vs.

JESS LARSON, AS WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR,
Respondent

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. The Opinion Below

The opinion of the United States Court of Appeals, District of Columbia Circuit, is at page 71 of the record. The District Court rendered no opinion but entered an order which is printed in the record at page 54.

2. Jurisdiction

The petition sets forth, on page 2, the grounds on which jurisdiction is invoked.

3. Statement of the Case

The petition sets forth an outline of the facts on page 4, under the caption, "Summary Statement of the Mat-

ter Involved." The allegations of the second amended complaint (R. 1) are to be taken as true because respondent's Motion to Dismiss was granted and hence only questions of law are involved herein.

4. Statutes Involved

The applicable sections of the statutes involved are quoted on page 2 of the petition.

5. Specification of Errors

The Circuit Court of Appeals erred in holding that:

1. Petitioner had no capacity to sue.

2. Petitioner had no contract with the respondent.

3. The United States is an indispensable party to the suit, whereas this action is against the Administrator.

ARGUMENT

Petitioner's Capacity to Sue

A. *Petitioner Had Entered Into a Contract With Respondent*

The petitioner's capacity to sue depends upon the question whether petitioner had entered into a contract with respondent.

It is clearly established that in offering property for sale, the seller may establish the terms and conditions of the sale, which terms and conditions are binding upon both the buyer and the seller.

In this case, the terms and conditions of the sale are found in the Letter and Formula for Acceptable Proposals (Ex. F, R. 23), War Assets Administration Regulation 5 and the Surplus Property Act of 1944.

Said Regulation 5, promulgated under the provisions of the Surplus Property Act, sets forth the procedure for the disposal of surplus property by the Administrator of War Assets.

The Administrator followed this procedure in seeking to sell said Plancor. He first established the fair value:

Regulation 5, Part 8305.13(a):

> Except as provided otherwise in this section, the disposal agency shall in all cases establish the fair value of the property assigned to it for disposition.

The Administrator then offered to sell the property (Exhibit F, R. 23) to the bidder "whose purchase proposal (a) meets and/or betters the terms and conditions of this Formula for Acceptable Proposals on a competitive basis and (b) best meets the Objectives of the Surplus Property Act" (Exhibit F, second paragraph, R. 23).

Regulation 5, Part 8305.3(b):

> It is the policy of the Administrator that real property shall be disposed of by such methods as best meet the objectives of the Act, including in appropriate cases, the use of sealed bids.

Any bid which is below the established fair value may be rejected—

Regulation 5, Part 8305.19(a):

> Disposal agencies may reject any offer which is below the fair value of the property • • •.

The bids in excess of the established fair value then must be considered and evaluated by the Administrator—

Regulation 5, Part 8305.19(a):

> In evaluating offers, the disposal agency shall be guided by all of the applicable objectives of the Act.

The amount of the bid is not controlling as long as the amount is in excess of the fair value. In fact, the only reference to amount is found in the last paragraph of Section 2 of the Surplus Property Act, as follows:

> (t) except as otherwise provided, to obtain for the government, as nearly as possible, the fair value of surplus property upon its disposition.

It is apparent from the above that the amount of the bid is subordinate to the other objectives of the Act, provided that the bid is in excess of the fair value.

The disposal procedure employed in this case was not the usual auction where the property, upon the fall of the hammer, is knocked down to the highest bidder and, until the seller accepts an offer, he may reject any offer.

The procedure in this case was an auction "without reserve" in which the seller makes an offer to sell. Consequently the making of a bid is an acceptance of the offer of the seller who cannot thereafter reject the bid.

This is the law in the District of Columbia where the sale was consummated and is covered by Section 21 of the District of Columbia Uniform Sales Act, as follows:

"Sale by Auction;

* * * * * * *

> (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve."

This rule is very clearly set forth in the Restatement of the Law of Contracts, Vol. 1, Sec. 27, as follows:

> Auctions; Sales without Reserve.
>
> At an auction, the auctioneer merely invites offers from successive bidders which he may accept or re-

ject unless, by announcing that the sale is without reserve or by other means, he indicates that he is making an offer to sell at any price bid by the highest bidder. In that case, after a bid has been made, the auctioneer cannot withdraw. Even though the sale is announced to be without reserve, any bidder may withdraw his bid until the auctioneer by fall of the hammer or in other customary manner, announces that the sale is complete. * * *

b. It is a corollary of the principle stated in the present section taken in connection with Section 41 that, where the auctioneer merely invites offers, a bidder may withdraw his bid at any time before the fall of the hammer. A bid in such a case is a revocable offer. If, however, the auctioneer has announced that the sale is without reserve, the auctioneer cannot withdraw after a bid has been made, but a bidder can withdraw his bid until the hammer falls. This is so provided in the Uniform Sales Act, Section 21.

The illustrations of an auction without reserve are found on page 35 of Volume 1 of the Restatement of the Law of Contracts.

3. A advertises, "I offer my farm Blackacre for sale to the highest bidder and undertake to make conveyance to such person as submits the highest bid within the next 30 days." This is an offer, and each bid operates as an acceptance creating rights and duties conditioned on no higher bid being received within 30 days.

The statement contained in the letter of the Administrator dated September 13, 1947 (Ex. F) squarely falls under the rule and the illustration set forth above. In the second paragraph of Exhibit F (R. 27), the Administrator writes:

War Assets Administration will make sale of this property to the bidder whose purchase proposal (a) meets and/or betters the terms and conditions of this formula for Acceptable Proposals on a competitive

basis and (b) best meets the objectives of the Surplus Property Act.

The Administrator did not reserve the right to reject bids for any reason or no reason at all in the letter to sell or the Formula for Acceptable Proposals (Ex. F, R. 23). No right to reject is found in Regulation 5 except when the bid is less than the fair value—

Regulation 5, Part 8305.19(a):

> Disposal agencies may reject any offer which is below the fair value of the property * * *.

Of course, in order to constitute an acceptance of the Administrator's offer to sell, a bid must comply with the terms and conditions of the sale, i.e., the letter to sell and the Formula for Acceptable Proposals (Ex. F, R. 23) and Regulation 5.

Petitioner's bid fully complied with all the terms and conditions of the sale and was an acceptance of the Administrator's offer to sell. The Tucker Corporation did not comply with the offer of respondent to sell and did not comply with the provisions of Regulation 5, Part 8305.19(d).

The Administrator realized that his offer to sell had been accepted by petitioner and he also realized that the bid of Missouri-Illinois Furnaces, Inc., would fail. It was apparent that he had no grounds upon which to disqualify the bid of petitioner. So the peculiar action of the Administrator in raising the fair value after opening and examining the bids becomes understandable. It was the only way for him to disqualify petitioner's bid—to bring it within the provisions of Regulation 5, Part 8305.19(a):

> Disposal agencies may reject any offer which is below the fair value of the property * * *.

If Regulation 5 or the Surplus Property Act contained any provision authorizing the Administrator to reject a bid for no reason at all, he would not have felt himself compelled to raise the fair value after the bids had been opened.

It is therefore clear that the Administrator's offer to sell said Plancor was an auction "without reserve," and that the bid of petitioner was an acceptance conditional on no more acceptable bid being received.

The bid of Missouri-Illinois Furnaces, Inc., failed with the result that the bid of petitioner was the only qualified acceptance of the Administrator's offer to sell. Therefore, a contract binding upon petitioner and the respondent was made so that the respondent can neither reject petitioner's acceptance of his offer nor withdraw the property from sale (Restatement of the Law of Contracts, Section 27).

B. *The Bid of Missouri-Illinois Furnaces, Inc., Failed*

1. Expiration of time limit.

The bid (Ex. A, R. 12) of Missouri-Illinois Furnaces, Inc., contained the following express conditions:

> 7. Title to the property included under Plancor 438 shall be delivered to us at a time to be mutually agreed upon *but not later than December 31, 1947.* (Italics supplied.) The property will be taken in its entirety on an "as is, where is" basis. The conveyance shall be made by quitclaim deed without warranty of title, express or implied.
>
> 11. *If such purchase is not completed by transfer of title to us prior to December 31, 1947,* there shall be refunded to us all amounts theretofore paid by us on account of the purchase price; the release by Koppers Company, Inc., of any obligations of War Assets Administration shall be ineffective; *and all other rights*

and obligations hereunder shall be null and void. (Italics supplied.)

Title was not delivered prior to December 31, 1947, nor was a quitclaim deed tendered to Missouri-Illinois Furnaces, Inc. Nor was such delivery prevented by injunction prior to December 31, 1947, because this action was not filed in the District Court until February 2, 1948.

After the happening of the condition, the bid of Missouri-Illinois Furnaces, Inc., expired and there was no contract upon which the respondent could base a sale to Missouri-Illinois Furnaces, Inc.

The action of the respondent in attempting to make a sale to Missouri-Illinois Furnaces, Inc., after December 31, 1947, constituted a new transaction which is contrary to the provisions of Regulation 5 and is in violation of the contract between respondent and petitioner.

This condition in the bid of Missouri-Illinois Furnaces, Inc., was not in conformity with the terms and conditions of the letter and Formula for Acceptable Proposals (Ex. F, R. 23) and it is therefore a new offer which is a rejection of the Administrator's offer to sell. *Noce, U. S. Dist. Engineer* v. *Edward M. Morgan Co.*, C.C.A. 8th Cir., 1939, 106 Fed. (2) 746. Of course, the acceptance of an offer may be qualified with a new condition such as the time limit in the bid of Missouri-Illinois Furnaces, Inc. If the condition is not fulfilled such acceptance may become, as in the language of the bid of Missouri-Illinois Furnaces, Inc., "null and void."

2. The bid of Missouri-Illinois Furnaces, Inc., violated the antitrust laws.

Congress provided in the Surplus Property Act of 1944 certain objectives set forth in Section 2 declared as objectives of the Act, one of which is as follows:

> (d) To discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns and the economy of free enterprise.

In order to prevent the development of monopolies, Congress further provided in Section 20 of said Act that in proceeding to sell to private interests surplus property which cost the Government a million dollars or more, the disposal agency should obtain the opinion of the Attorney General as to whether such proposed disposition would violate the antitrust laws. The term "antitrust laws" as used in Section 20 includes the Act of July 2, 1890 (Ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (Ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act; and the Act of August 27, 1894 (Ch. 349, secs. 73, 74, 28 Stat. 570), as amended.

In view of the fact that the Government is vitally interested in enforcing the acts of Congress *supra*, in preventing the growth and spread of monopolies, it would be very unreasonable indeed to permit the respondent, as an agent of the Government, to proceed to dispose of surplus property so as to increase the monopolistic control of corporations.

Congress realized that the observation and enforcement of the antitrust laws is a matter of national concern and in order to guard against the possibility that the respondent might make a sale to a monopoly and in violation of the antitrust laws, provided that he should first obtain the opinion of the Attorney General in regard to any proposed disposal of surplus property.

Accordingly, respondent referred the bid of Missouri-

Illinois Furnaces, Inc., to the Attorney General, who thereafter found that a sale of said Plancor to Missouri-Illinois Furnaces, Inc., would be in violation of the antitrust laws, and it was so stated by John F. Sonnett, Assistant Attorney General:

> "This Department reached the conclusion that the combination of the two companies growing out of the joint stock ownership of the proposed purchaser would, particularly because of the affiliations of Hanna Coal and Ore Company, result in violations of the antitrust laws." (Ex. I, 3rd par., R. 36).

Respondent should have immediately disqualified the bid of Missouri-Illinois Furnaces, Inc., when it was determined that the bid of Missouri-Illinois Furnaces, Inc., was in violation of the antitrust laws. It follows that the bid was illegal, and that respondent was entirely without authority under his own regulations and the statute to proceed to make a sale to Missouri-Illinois Furnaces, Inc.

However, this is exactly what the respondent proposes to do; that is, to predicate a sale upon a bid which has been found to be in violation of the law.

3. Respondent is presuming to make a sale without the requisite statutory approval of the Attorney General.

After the determination was made that the bid of Missouri-Illinois Furnaces, Inc., was in violation of the antitrust laws, the Department of Justice informed representatives of the two companies, i.e., Hanna Coal and Ore Company and Koppers Co., Inc. (Ex. I, 5th par., R. 37). Thereafter, a rapid exchange of letters took place.

Missouri-Illinois Furnaces, Inc., on January 14 sent a letter (Ex. C, R. 23) to respondent stating that Hanna Coal and Ore Co. would sell its stock in Missouri-Illinois Coal and Ore Co. to Koppers Co., Inc., and that thereafter

Missouri-Illinois Coal and Ore Co. would be dissolved and its property transferred to Koppers Co., Inc. The final paragraph of this letter stated:

> "A copy of this letter is being sent to the Attorney General of the United States since the changes herein outlined are made to conform to his views." (Ex. C, R. 24).

On the very same day, January 14, 1948, respondent replied by letter (Ex. D, R. 24) to Missouri-Illinois Furnaces, Inc., stating that he had no objection to Hanna Coal and Ore Company selling its stock in Missouri-Illinois Furnaces, Inc., to Koppers Co., Inc., and that he had no objection to the dissolution of Missouri-Illinois Furnaces, Inc., and the transfer of its property to Koppers Co., Inc. The next day, January 15, 1948, being the last day of the ninety-day period allowed in Section 20 of the Surplus Property Act for the Attorney General to render his opinion, an Acting Assistant Attorney General assumed to render an opinion in a letter (Ex. E, R. 26) to respondent stating that a sale of Plancor 438 to Missouri-Illinois Furnaces, Inc., as a wholly owned subsidiary of Koppers Co., Inc., would not be in violation of the antitrust laws. The Attorney General did not endorse his approval on this opinion, nor did he render an opinion.

The respondent thereupon, under the guise of the mere color of compliance with Section 20 of the Surplus Property Act, proceeded to make a sale of said Plancor to Missouri-Illinois Furnaces, Inc., or to Koppers Co., Inc., even though the representation in the letter of Missouri-Illinois Furnaces, Inc. (Ex. C, R. 23) was merely that Hanna Coal and Ore Company would sell its stock to Koppers Co., Inc.

The language of Section 20 of the Surplus Property Act is clear and unequivocal and requires that the disposal agency, the respondent, obtain the opinion of the Attorney

General. In 21 Opinions, Attorney General, 74, 1895, it was stated as follows:

> "The Attorney General must personally pass on every question so submitted to him for although he may * * * refer the question to a subordinate for a written opinion, the action of the subordinate must be examined and approved by the Attorney General to give it effect."

This direction and opinion is in accordance with the provisions of Title 5, U. S. C. A. 308. It is to be noted that officers of the Government may refer questions to the Department of Justice or to the Attorney General for opinions and that a subordinate in the Department of Justice may render an opinion. However, when the opinion of the Attorney General is specifically required, the Attorney General himself must render the opinion or, if he refers the question to a subordinate, he must endorse his approval thereon in order that the opinion shall have the force and effect of the opinion of the Attorney General (Title 5, U. S. C. A. 308).

As stated above, the Attorney General did not endorse his approval on the opinion (Ex. E. R. 26) of the Acting Assistant Attorney General nor did the Attorney General himself render any opinion approving the sale to Missouri-Illinois Furnaces, Inc.

It is perhaps significant to note that in this situation, involving a clear violation of the antitrust laws, the Attorney General properly refrained from rendering an opinion approving the sale after it was determined that the bid of Missouri-Illinois Furnaces, Inc., was in violation of the antitrust laws. It is also interesting to observe that it was an Acting Assistant Attorney General who undertook to clothe respondent with a thin veil of authority.

4. Respondent is attempting to make a sale to a stranger to the bidding.

As previously pointed out, the method in the sale of this property was that of securing sealed bids under strict qualifications and with full disclosure. When a bid failed, as did the bid of Missouri-Illinois Furnaces, Inc., it should have been rejected. The respondent had no power or authority under Regulation 5 of the Surplus Property Act to sell said Plancor to a party which had not filed a bid on October 6 pursuant to the letter (Ex. F, R. 23) offering said Plancor for sale. Koppers Co., Inc., had not filed a bid and acquired no legal right to enter into a contract to buy said Plancor. The change in stock ownership and the representation that Missouri-Illinois Furnaces, Inc., would be dissolved and its assets transferred to Koppers Co., Inc., is a flimsy and inadequate attempt which utterly fails to disguise the actual facts—that respondent is attempting to sell said Plancor to Koppers Co., Inc., a stranger to the bid.

5. Petitioner's bid constitutes the acceptance of respondent's offer to sell.

The bid of Missouri-Illinois Furnaces, Inc., was illegal and void. The bid of petitioner was the bid which best met the terms and conditions of respondent's offer to sell (Ex. F, R. 27), and was the bid which accepted respondent's offer. A contract was formed between petitioner and respondent for the sale of said Plancor to petitioner and respondent is obligated to proceed with the sale of said Plancor pursuant to the provisions of Regulation 5.

C. *This Action Is Against an Agent Who Is Presuming to Act Without Authority*

1. It is not a suit against the Federal Government.

This is not a case against the Federal Government but is an injunction sought against the illegal and unauthorized action of the respondent in his personal capacity as War Assets Administrator and Surplus Property Administrator from doing illegal actions in violation of public law and his own Regulations. The case, *United States* v. *Lee,* 106 U. S. 196, reaffirms the rule that an action will lie against an agent of the Government for improper action. This rule has been approved in:

Philadelphia Company v. *Stimson,* 223 U. S. 605, 619, 620; 32 S. Ct. 340, 56 L. Ed. 570;

Goltra v. *Weeks,* 271 U. S. 536, 545; 46 S. Ct. 613, 70 L. Ed. 1074;

Ickes v. *Fox,* 300 U. S. 96; 57 S. Ct. 412, 81 L. Ed. 525.

In the case of *Domestic and Foreign Commerce Corporation* v. *Littlejohn,* U. S. App. D. C., 1947, No. 9553, the Court had the following to say:

> "We have recently had occasion to scrutinize the doctrine of sovereign immunity as a 'jurisdictional' problem, and in doing so we deemed it expedient to adopt the careful analysis which had been previously made by Justice Stephens of this Court in his opinion (dissenting in part, concurring in part) in *Franklin Tp. in Somerset County, N. J.* v. *Tugwell,* 66 App. D. C. 42, 85 F. (2d) 208. For its obvious value in this case we repeat his finding, stated (66 App. D. C. 63; 85 F. (2d) 229) that:
>
> > 'Where a plaintiff asserts that an officer of the Government is acting without power and that therefore his acts are invalid, the Court in determining the preliminary jurisdictional question whether the United States is a necessary party (whether neces-

> sary parties are before a court is, of course, jurisdictional), is confronted with a peculiar procedural problem, or impasse, arising out of the fact that the determination of this question involves passing upon the very question involved in the merits. * * * Since a court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that when the merits are heard, it may be compelled to reach an opposite conclusion. The courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are "so unsubstantial and frivolous as to afford no basis for jurisdiction . . .", (citing *Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897) and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties.' "

The principle of *Franklin Township* v. *Tugwell, supra,* wherein the Court affirmed the restraining of an invalid act by a Government official relied also upon the following authorities:

Payne v. *Central Pac. Ry. Co.*, 228 U. S. 228, 41 S. Ct. 314, 65 L. Ed. 598;

Northern Pac. Ry. Co. v. *N. D.*, 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897;

Wells v. *Roper,* 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 755;

Lane v. *Watts,* 234 U. S. 525, 34 S. Ct. 965, 58 L. Ed. 1440;

U. S. v. *Lee,* 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171;

Transcontinental & Western Air v. *Farley,* C. C. A. (Cert. denied) 71 F. (2d) 288, 293 U. S. 603, 55 S. Ct. 119, 79 L. Ed. 695.

In the case of *First National Bank of Holdenville* v. *Ickes*, 1946, 54 F. (2d) 851, 81 U. S. App. D. C. 61, the Appellate Court again repeated the principle as follows:

> "When a complainant avers lack of official power and the defendant officer counters with an assertion of power and governmental interest in the property involved, a procedural dilemma is presented which the Courts have resolved in the manner indicated."

The principle was repeated in the case of *Wilbur, Secretary of Interior* v. *Secretry ex rel. Krushic*, 1930, 280 U. S. 806, 50 S. Ct. 103, 74 L. Ed. 445, where the court said:

> "In this case the Secretary interpreted and applied a statute in a way contrary to its explicit terms and in so doing departed from a plain official duty. A writ of mandamus should issue directing a disposal of the application for patent on its merits, unaffected by the temporary default in the performance of assessment labor for assessment year 1920."

See also *Red Canyon Sheep Company* v. *Ickes*, 1938, 69 App. D. C. 77, 98 F. (2) 308, and *Ferras* v. *Wilbur*, 27 Fed. (2d) 262, where Judge Parker stated:

> "Where an act is unauthorized, the person attempting it may be restrained regardless of the claim that he is acting in his official duty."

In *Appalachian Electric Power Co.* v. *Smith*, District Court of Virginia, 1933, 4 F. Supp. 6, the court said:

> "The test is whether the persons sued in taking the action complained of have acted within or in excess of their lawful authority."

In *Philadelphia Co.* v. *Stimson, Secretary of War*, 223 U. S. 605, at page 619, it is said:

> ". . . and in case of injury rendered by his illegal action the officer cannot claim immunity from injunc-

tion process. The court is not asked to interfere with the official duties of the Secretary of War. It rests upon the charge of abuse of power. It is not a suit against the United States."

In the case of *Board of Liquidation* v. *McComb*, 92 U. S. 531, 23 L. Ed. 623 Mr. Justice Bradley said:

> "But it has been well settled that when a plain official duty requiring no exercise of discretion is to be performed and performance is refused, any person who will sustain personal injury thereby for which adequate compensation can be had at law, may have an injunction to prevent it. In such cases the writ of mandamus and injunction are somewhat correlative to each other."

See also, *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784.

In two late cases, *Dollar* v. *Land*, 1946, 154 Fed. 307, 81 U. S. App. D. C. 28, and *Domestic and Foreign Commerce Corporation* v. *Littlejohn*, 165 Fed. 2nd, 235 (App. D. C. 1947) the Court of Appeals held that action could be maintained against an agent of the Government. In *Dollar* v. *Land* it was alleged that the agent of the Government was attempting to sell certain property held by him under a contract of pledge to secure a debt which had been paid. In *Domestic and Foreign Commerce Corporation* v. *Littlejohn*, it was alleged that plaintiff had entered into a contract with the agent for the sale of certain property which the agent was attempting to sell to another party. In both cases the Court of Appeals affirmed the rule that action can be maintained against an agent of the Government who is seeking to dispose of property in violation of his contract with the plaintiff.

In the case at bar petitioner had entered into a contract with respondent and is entitled to maintain an action against respondent and to prevent the sale by respondent of said property to another party.

D. *The Complaint Justifies Equitable Relief, Because:*

1. The property, in part, consisted of real property, and is unique and irreplaceable.

The Government brochure (Ex. G, R. 26) stated that the property consisted of several tracts of land, 210.70 acres, of which 90 acres were actually in use. There was a battery of forty-nine (49) by-products ovens, together with a blast furnace plant, coke by-products plant, railroad facilities, four plant structures and plant utilities. It is a type of structure that is unique and by virtue of its proximity to sources of supply of iron ore, it was unique and irreplaceable. The powers of equity are accordingly appropriate in this particular field. In connection with this proposition see *Columbian Cat Fanciers, Inc.*, v. *Koehne, et al.*, 1938, 68 App. D. C. 257, 260, 96 F. (2d) 529, where the Court stated:

> "It is elementary that 'the jurisdiction of equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer in the same circumstances.' *Kilbourn* v. *Sunderland*, 1889, 130 U. S. 505, 514, 9 S. Ct. 594, 596, 32 L. Ed. 1005; *Boyce's Executors* v. *Grundy*, 1830, 3 Pet. 210, 215, 7 L. Ed. 655; *Spignul* v. *Blundon*, 1923, 53 App. D. C. 29, 30, 287 F. 1006. ' "Adequate remedy at law" means a remedy vested in the complainant, to which he may at all times resort at his own option, fully and freely, without let or hindrance.' *Beach* v. *Beach Hotel Corp.*, 1933, 117 Conn. 445, 453, 168 A. 785, 788; *Wheeler* v. *Bedford*, 1886, 54 Conn. 244, 249, 7 A. 22, 24."

2. Money damages would be speculative and difficult of proof.

The petitioner would be without relief at law since money damages would be inadequate and it would be extremely difficult to prove the extent of such damages. It is readily

apparent from the record that the property in question is unique and that an action for damages would provide inadequate relief coupled with speculative damages, and therefore injunctive relief is the proper remedy in the premises.

WHEREFORE, the premises considered, it is respectfully submitted that this Court should issue its writ of certiorari.

Respectfully submitted,

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